No. 6587

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WARREN H. PILLSBURY, Deputy Commissioner 13th Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act, and V. H. HAMMER,

Appellants,

vs.

PACIFIC STEAMSHIP COMPANY, a corporation; UNION INSURANCE SOCIETY OF CANTON, LTD., a corporation,

Appellees.

Supplementary Memorandum for Appellees.

Upon Appeal from the United States District Court for the Southern District of California, Central Division.

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I. *Distinctions Between the Gunther Case and the Case at Bar.*

II. *The District Court Did Not Try the Case De Novo.*

III. *The Fact that the Deputy Commissioner Applied Subsection (b) of Section 10 of the Act Without the Essential Findings for such Conclusion Warranted Without More the Suspension of his Award.*

I.

DISTINCTIONS BETWEEN THE GUNTHER CASE AND THE CASE AT BAR.

1. Subsection (b) of Section 10 could properly be applied in the *Gunther* case because Gunther was a steady and regular worker. His wife testified that "he worked steadily". The gang boss testified that he was "a hustler" and had steady employment. A fellow worker, Witt, testified that he had known Gunther for a number of years, and that they had worked together, though not during all of the year preceding the accident, and earned practically the same money. Witt earned in excess of the maximum and worked substantially all the year. The fair inference is that Gunther worked *at the rate of,* if not actually, 300 days a year.

Furthermore Witt, who was taken as the key man for the application of Subsection (b), was a stevedore in the same class as Gunther. They worked together at the same rate of pay and "they both earned practically the same money".

We thus have in the *Gunther* case the two elements essential to the application of Subsection (b), namely, that Gunther was a regular, not an intermittent, worker em-

ployed at the rate of 300 days a year, that is 6 days a week, even though he did not in fact work the whole year; and secondly, that the model or key man was a stevedore in the same class with himself.

Hammer, on the other hand, belonged in the lowest of the three classifications of stevedores in San Diego. His position with that gang foreclosed to him the possibility of work at the rate of 6 days a week in steady employment. The Commissioner did not find and the evidence does not show that he worked at that rate, but shows on the contrary that he averaged not more than 4 days work per week. Trimble, with whom he was compared for the purpose of the application of Subsection (b) was a steady worker in the first classification of stevedores who had employment at the rate of substantially 300 days per year.

But for the fact that this court did not want to overturn the finding of the Commissioner that Gunther had not worked more than 200 days in the year, the statement that he had worked along with Witt and that they had earned practically the same money, taken with the evidence that Witt worked substantially the whole year, might even have justified the application of Subsection (a) in the *Gunther* case.

2. Even assuming the use of Subsection (c) to have been proper in the *Gunther* case, this court held it was improperly applied. Earning capacity was what was sought to be found. The Commissioner took the evidence of *certain* employers but there was no showing that these were the *only* employers. On this theory the Deputy

Commissioner found the earnings to have been only $895. This could not have been all. The wife of Gunther testified that their expenses were not less than $40 per week, of which $35 per month was actually identified as rent. She testified that they had no income other than Gunther's earnings. Witt, his companion stevedore, testified that the two men worked together though not during all the year; that both earned practically the same money and that he, Witt, had earned $2100.

This court therefore concluded that the substantial evidence showed Gunther to have earned more than the Commissioner found and that the Commissioner's finding was not based upon substantial but only upon partial and unpersuasive evidence.

In contrast, Hammer's actual earnings were shown by the payrolls of *all* the companies for whom he worked, with the exception of 12 jobs on lumber ships his earnings from which were fairly estimated by other stevedores. Hammer had all his employment through the Marine Service Bureau with the exception of a few jobs on the Harvard and Yale which were picked up at 6 days work through the payrolls. Therefore in distinction to Gunther all his earnings were accounted for. The claim of greater earnings based on loose estimates of expenses and guesses of witnesses was obviously speculative and properly ignored by the District Court.

The District Court in this case and the district courts in the Northern District of California, Oregon and Washington in similar cases have suspended awards of deputy commissioners to stevedores under Subsection (b). They

distinguish the *Gunther* case and deem their action not inconsistent with it. We submit that these decisions may stand without disturbance of the Gunther decision, with which we think they are in harmony.

II.

THE DISTRICT COURT DID NOT TRY THE CASE DE NOVO.

It is suggested on pages 4 and 23 of the Government's brief that the District Court may not try the case *de novo* or weigh the evidence, but is bound to sustain the Commissioner's findings if supported by any evidence. The cases are to this general effect, but show the true test to be not whether there is *any,* but whether there is any *substantial* supporting evidence. The cases quite as clearly hold that the Deputy Commissioner's findings must not be arbitrary or capricious or based on mere speculative evidence.

> "The compensation order may be set aside only if it is found to be 'not in accordance with law', i. e., if it is based upon error of law, *or is not supported by any substantial evidence, or is so manifestly arbitrary and unreasonable as to transcend the authority vested in the Deputy Commissioner.*" (Italics ours.)
>
> *Wheeling Corrugating Co. v. McManigal,* 41 F. (2d) 593, 594 (C. C. A. 4th, 1930).

In

Wellgeng v. Marshall, 32 F. (2d) 922, 924,

Judge Neterer suspended a compensation order because "the finding is clearly arbitrary and capricious".

In

Grays Harbor Stevedore Co. v. Marshall, 36 F. (2d) 814, 815 (W. D. Wash., 1929),

the court said:

> "The evidence is scanty, ambiguous, indefinite, and uncertain in respect to the elements of effect, continuity, and time, and is not legally sufficient to warrant what appears to be the deputy's arbitrary finding."

Most of the cases say that evidence may not be taken before the District Court but that the court must deal with the case on the evidence already taken before the Commissioner, though one Circuit Court of Appeals has held that new evidence may actually be taken by the District Court.

> *Crowell v. Benson,* 45 F. (2d) 66, 68 (C. C. A. 5th, 1930); affirming, 33 F. (2d) 137. The case is now on certiorari in the U. S. Supreme Court, 283 U. S. 814, 75 L. Ed. 1430.

However no new evidence was taken in this *Hammer* case so we are not concerned about that.

As respects disturbance of the Commissioner's findings of fact, the District Court did not do that. The findings of fact are shown on pages 9 and 10 of the printed transcript and were all matters agreed to and conceded at the opening of the hearing—pages 1 onward of the typewritten transcript. The *so-called* finding of fact "that claimant's wages and compensation rate is therefore fixed at said maximum under Section 10 (b) of said Act" is of course no true finding of fact but a conclusion of law, and

we submit "not in accordance with law" as required by the Act. The findings necessary to this conclusion were not made by the Commissioner, namely that Hammer worked at the rate of 6 days a week and that there was another stevedore *in his same class* who worked substantially the whole year and earned the maximum compensation.

In this posture of the case there is nothing in any of the cases cited by our opponents nor in any of the cases that we have read, nor in common sense, to foreclose the District Court against examining the record before the Commissioner to see whether there is any *substantial* evidence to sustain his conclusion. The District Court here, as we have pointed out, properly found that there was no such substantial evidence.

The District Court's conclusion that the claimant's earnings were $355.38 or $19.00 a week, objected to at page 23 of the government's brief, is, as we have repeatedly pointed out, based on the only *substantial* evidence as to earnings in the record. The so-called testimony of greater earnings was purely surmise and speculation against the positive payroll records from all the companies for whom Hammer worked, supplemented by reasonable proof of what he earned for the lumber companies not included in the payrolls. On this feature then, the District Court was not weighing the evidence or overruling any finding of the Commissioner, but merely stating what the only substantial evidence showed and so finding (Printed transcript, page 30). All of the court's other findings (and it was required to make findings

under Equity Rule 70½) are on evidence which was all one way. If this particular finding, to which exception is taken, were omitted and the case sent back without it, the court would again have to suspend the award if the Commissioner came to any other conclusion on the record before him. There would be no substantial evidence to sustain it. The case is not intended to be tossed back and forth in this way like a medicine ball from court to Commissioner.

III.

THE FACT THAT THE DEPUTY COMMISSIONER APPLIED SUBSECTION (b) OF SECTION 10 OF THE ACT WITHOUT THE ESSENTIAL FINDINGS FOR SUCH CONCLUSION WARRANTED WITHOUT MORE THE SUSPENSION OF HIS AWARD.

An award which lacks essential findings is not "in accordance with law".

Howard v. Monahan, 33 F. (2d) 220 (S. D. Texas, 1929).

Respectfully submitted,

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